IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8856 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DIPALI MRUGEN PUROHIT

Versus

MUNICIPAL COMMISSIONER

Appearance:

MR K.G.VAKHARIA for MR MITUL K SHELAT for Petitioner

MR HS MUNSHAW for Respondent No. 1, 4

MR BP TANNA for TANNA ASSOCIATES for Respondent No. 3

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 19/04/2001

C.A.V. JUDGEMENT

1. The petitioner has challenged the Advertisement dated 14.7.2000 inviting applications from general category candidates for one post of Junior Lecturer - cum

- Refractionist at C.H.Nagri Eye Hospital, and has prayed that this advertisement be quashed and has further prayed that the respondent Ahmedabad Municipal Corporation be directed to fill-up the post of aforesaid Junior Lecturer from amongst the eligible candidates of Scheduled Tribe and Socially & Economically Backward Class (S.E.B.C.) category.

2. Brief facts giving rise to this petition are that the petitioner belongs to SEBC Category and obtained Certificate from District Social Welfare Officer (Annexure : A). She possesses requisite qualification, namely, she holds Diploma in Ophthalmology and Master of Surgery in Ophthalmology standing first class first in both the examinations. There was huge backlog regarding appointments on the reserved post. Consequently the respondent No.1 through advertisement dated 17.11.1998 published in daily "Sandesh" a news paper, invited applications from the candidates of SC/ST, Socially & Economically Backward class as well as from persons suffering from physical handicaps for filling up the backlogs in 96 different categories of posts by Municipal Corporation. Item No.47 in the said advertisement relates to the post of Refractionist - cum - Junior Lecturer. It was only one post which was reserved for ST & SEBC candidates, etc. vide Annexure : B. In response to this advertisement the petitioner submitted her application to the respondent No.2 and was called for interview on 15.3.1999 vide interview letter Annexure : C. The petitioner remained present in the office of the respondent No.1 on 15.3.1999. She was informed that she was the sole eligible candidate. Her documents were verified by the Official of the Corporation. She was asked to wait for interview. Around 1.00 p.m. the petitioner was informed that the Municipal Commissioner was engaged in a meeting with the World Bank and therefore the interview was postponed and the petitioner would be informed of the rescheduled date of interview. The petitioner handed over letter intimating her attendance in the office of the Municipal Commissioner. Thereafter she waited regarding rescheduling of interview, but failed to receive any communication. She made representations to the Commissioner of the Corporation on 17.4.1999 and 26.4.1999, but the representations were not replied. She also made representation to the Minister for Social Welfare, etc. calling upon him to take necessary action in the matter vide Annexure : F. Further representations were made by her to the Mayor of Ahmedabad City, Minister for Urban Development and Municipal Commissioner of the respondent Corporation on 3.5.1999, 3.6.1999 and 3.5.1999

respectively. However, these representations also evoked no response. It is averred that prior to and during pendency of interview the respondent No.3 had been appointed on the said post on temporary basis and had been holding the said post for the last three years. The said respondent is general category candidate and had been continued on the said post since 12.12.1998 till date under the Resolutions of the Corporation dated 13.5.1999 and 2.7.1999. Her term was further extended from 12.12.1998 for a period of six months under Resolution dated 2.7.1999 of the Standing Committee. The case of the petitioner is that the aforesaid post is a reserved post which is required to be filled from amongst ST/SEBC candidates only though no resolution was passed by the standing Committee of the Corporation continuing the appointment of the respondent No.3 after 13.12.1999 still she is holding the said post. The petitioner made representation vide letter dated 14.4.2000, but with no result. On 14.7.2000 through subsequent advertisement the respondent invited applications for the aforesaid post from general category candidates vide Annexure : I. The petitioner also applied in response to this advertisement. Her further grievance is that the action of the Corporation in converting the reserved post into a general category post is arbitrary, unconstitutional, illegal and contrary to the reservation policy. It is also averred by the petitioner that the post in dispute is not a single post. There are 4 posts of the said cadre in the Corporation and as such the reservation already granted cannot be withdrawn on the ground that reservation does not apply to a single post.

3. The stand of the respondent No.3 in her counter Affidavit is that the post of Refractionist - cum Junior Lecturer in C.H.Nagri Eye Hospital is isolated post and single post, hence there cannot be any application of reservation policy for the single post in view of the Judgments of the Apex Court in R.K.Sabarval v/s. State of Punjab, reported in 1995 (2) SCC 75 and Post Graduate Institute of Medical Education Research, Chandigarh v/s. Faculty Association & ors. reported in AIR 1998 SC 1767. It is also stated that the petitioner, though eligible candidate can appear in the interview along with general category candidate and she can be selected if she is found meritorious. Another stand of this respondent is that the petitioner belongs to Creamy Layer of the backward class hence she is not entitled to any reservation.

4. The stand of the Municipal Corporation is that there are only two posts of Refractionist - cum - Junior

Lecturer in the said Hospital and both the posts were in abeyance since number of years and only one post was released on 21.3.1997 and thereafter advertisement was issued for Recruitment and it was reserved for ST/SEBC candidates. Since no candidate was available in pursuance of advertisement dated 9.7.1997 another advertisement was issued on 17.11.1998 and the petitioner was one of the candidates and interviews were to be held on 15.3.1999, but due to Government Resolution dated 9.3.1999 by the Government of Gujarat it was decided not to hold interviews and fill-up the post. In pursuance of this resolution of the Government the General Body of the Municipal Corporation, Ahmedabad, resolved to follow the Government Resolution dated 9.3.1999 and implement the same with immediate effect. The Roster system was readjusted as per the said Government Resolution. On 16.7.1999 the General Body of the Corporation passed resolution that so far as issue of Roster system is concerned the policy of Government of Gujarat would be applicable from time to time and therefore there was no question of filling up the said post through ST/SEBC candidates and on readjustment of the roster system the first three appointees are from other category candidates i.e. not from reserved category candidates and therefore in fresh advertisement the post is kept for general candidates. It is further the stand of the Corporation that since only one post is to be filled up and it is for general category, the candidates belonging to all other categories can apply and compete on merit.

5. In further Affidavit dated 7.2.2001 the Corporation has again come out with a case that there are only two posts of Refractionist - cum - Junior Lecturer in C.H.Nagri Eye Hospital. There were two budget posts for the year 1998-99 and 1999-2000 and out of them one is kept in abeyance and one is to be filled. In support of it Annexure : A has been filed with this Counter Affidavit.

6. Shri K.G.Vakharia for Shri Mitul K. Shelat, learned Counsel for the petitioner, Shri H.S.Munshaw, learned Counsel representing the Corporation and Shri B.P.Tanna, learned Counsel appearing for the respondent No.3 were heard and the materials on record were examined. Number of Affidavits, Counter Affidavits, Rejoinder Affidavits, Sur Rejoinder Affidavits have been filed which were also taken into consideration.

7. The contention of Shri H.S.Munshaw and Shri B.P.Tanna has been that the post is now not meant for reserved category candidates and there is no prohibition

if candidates belong to other categories, namely, ST/SEBC also apply for the post and if they are called for interview they can compete with general category candidates and it is incorrect that the only post is reserved for ST/SEBC candidates. They have also referred to the Government resolution dated 8.3.1999 and contended that in view of this resolution reservation cannot be applied for single post. It has also been contended that reservation policy is to be applied on post basis and not on the basis of vacancy or actual vacancy as mentioned in Government Resolution. If Government Resolution dated 8.3.1999 is considered to be applicable then the contention of Shri Munsha and Shri B.P.Tanna has to be accepted and the petitioner will be out of Court. However, it has to be seen from the record as to in what manner this post, whether single or two posts, was treated by the Municipal Corporation since beginning and whether Government Resolution dated 8.3.1999 will have prospective operation or it will have retrospective operation.

8. So far as operation of the Government Resolution dated 8.3.1999 is concerned it will apply prospectively and not retrospectively. It comes from the Government Resolution itself that in those cases where direct appointments were made prior to the resolution reschedulement of roster is not required and it will apply to fresh direct appointment after 8.3.1999.

9. The next point for consideration is whether the post in question can be held to be single post or that there were two posts for which appointments could be made. From the additional counter Affidavit dated 7.2.2001 it is clear that the stand of the respondent No.1 is that there are only two posts of Refractionist cum Junior Lecturer in C.H.Nagri Eye Hospital and that there were two budget posts for the year 1998-99 and 1999-2000 and out of them one is kept in abeyance and one is to be filled up. Annexure : I has been annexed with this Counter Affidavit in which it is shown that budget post in 1998-99 for Refractionist - cum - Junior Lecturer was two and for 1999-2000 two posts were there, but one was kept in abeyance and only one post was available to be filled up. Thus, it is clear that only one post of Refractionist - cum - Junior Lecturer was available for consideration and appointment.

10. Before applying the Government resolution dated 8.3.1999 it would be pertinent to trace the history of advertisement and various resolutions passed by the General Body and Standing Committee of the Ahmedabad

Municipal Corporation. Para : 4 of the Counter Affidavit dated 31.8.2000 of the Officer on Special Duty of the Corporation clearly shows that C.H.Nagri Hospital is run and administered by Municipal Corporation, Ahmedabad and one post known as Refractionist - cum Junior Lecturer was to be filled up as it was lying vacant. It is further deposed that as per Roster policy the said post was to be filled up through a candidate belonging to ST category or Socially & Educationally Backward class category and accordingly advertisement was published in news paper in November, 1998. In all four applications were received, but only one candidate, namely, the petitioner was holding requisite qualification hence it was decided to call her for interview on 15.3.1998. Page : 99 of the compilation is the advertisement dated 17.11.1998. In this advertisement it is mentioned at the top "SPECIAL RECRUITMENT DRIVE FOR SCHEDULED CASTE CANDIDATES". The opening portion of the above mentioned advertisement recites that the applications are invited from the concerned caste candidates paiki Scheduled Caste, Scheduled Tribe, Socially & Educationally Backward class and physically handicapped for filling up the backlog vacancy for the below mentioned post. Inter-alia at Sr.No.47 of this advertisement the post of Refractionist - cum - Junior Lecturer is mentioned and the number of post was shown to be one. It is thus clear from this advertisement that it was issued to clear the backlog vacancy as a special recruitment drive for ST/SEBC/Physically handicapped persons. This is the origin of the advertisement. The question is whether such special recruitment drive could be undertaken by the Municipal Corporation which is apparently the State within the ambit of Article 12 of the Constitution of India. Article 16(4) of the Constitution of India provides that nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. Thus, under Article 16(4) of the Constitution of India the State is empowered to make any provision for reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. The Municipal Corporation being a State thought it fit to clear the backlog vacancies and therefore special recruitment drive for SC/ST & SEBC candidates was made. There were several posts vacant and in this special drive for SC/SEBC at Sr.No.47, one post of Refractionist - cum - Junior Lecturer was also

intended to be filled up. This action of the State, namely, the Municipal Corporation was in accordance with the mandate of the Constitution of India enshrined in Article 16(4) of the constitution of India.

11. The question now is whether this stand of the State could subsequently be changed on the strength of subsequent resolution dated 8.3.1999 of the Government to convert the post meant to be filled by ST/SEBC candidates for general category candidates.

12. It may be mentioned that the advertisement dated 17.11.1998 which was issued in exercise of powers under Article 16(4) of the Constitution of India could not be revoked by subsequent advertisement of July, 2000 (Annexure : I) which is under challenge in this petition. It appears from the record that all through this single post was considered by the Corporation to be reserved post for SC/ST/SEBC candidates. An attempt has been made to take shelter behind the Government Resolution dated 8.3.1999 but if resolution No.356/99-2000 dated 2.7.1999 is taken into account it clearly speaks that the respondent No.3, out-side approved candidate, was appointed on the post till a suitable candidate for filling the post out of ST/SEBC is found, and the appointment of the respondent No.3 was extended for six months. Thus, even on 2.7.1999 i.e. after implementation of the G.R. dated 8.3.1999 the Corporation considered this single post as reserved post for ST/SEBC candidates. There is clear mention in this resolution that the extension for six months was given to respondent No.3 till any suitable candidate from ST/SEBC is appointed and this resolution of the Standing Committee was accepted and approved by the General Body of the Corporation vide its resolution No.497 dated 22.10.1999. Thus, even upto October, 1999 this single post was considered by the Corporation as reserved post for ST/SEBC candidates. Annexure : G (Page : 94) also gives the same clear indication.

13. It appears from Page : 101 that on the basis of letter dated 3.6.1999 of the Municipal Commissioner that the Standing Committee passed a resolution No.264 dated 3.6.1999 to implement the resolution of the Government dated 8.3.1999 which was approved in the General Body meeting held on 16.7.1999 vide page : 100, but still neither the letter of the Commissioner nor the Resolution of the Standing Committee No.264 or resolution of the General Body No.333 of 1999-2000 dated 16.7.1999 were implemented and even subsequent to these resolutions being adopted, the earlier advertised post was being

considered as a post reserved for ST/SEBC candidate till 22.10.1999. How can then it be said that the Resolution of the Government dated 8.3.1999 can be applied or was applied by the Corporation to the disputed post.

14. From Para : 3 of the G.R. dated 8.3.1999 it follows that the Government had taken decision to enforce the new Roster at present on post based in place of vacancy based. Enforcement of the new roster at present indicates that its operation could not have retrospective operation. The new roster is to be prepared on post based and not on vacancy based prospectively.

15. At this juncture it would be relevant to point out in what manner the earlier advertisement was dealt with by the Corporation. In response to earlier advertisement Ex.B dated 17.11.1998 the petitioner applied. She was found eligible. Interview letter was issued to her. The date of interview was fixed as 15.3.1999. The petitioner has clearly averred that she was present on that date. Her papers and Certificates were verified by the Official of the Municipal Corporation. She was made to wait till 1.00 p.m. when she was informed that because the Municipal Commissioner was busy in some meeting the interview was postponed and subsequent date would be intimated. Thereafter no intimation was given to the petitioner. It may be mentioned that she was the only eligible candidate to be interviewed in response to advertisement dated 17.11.1998 and as such interview was a mere formality. If she fulfilled all the qualifications and was sole candidate she could have been found fit to be selected and appointed. However, such interview was postponed and till date no interview has been arranged in response to the earlier advertisement. Annexure : D shows that the petitioner marked her presence at the office of the Municipal Commissioner. Thereafter she had been making representations, Ex.B dated 17.4.1997, Ex.F dated 1.5.1999, Ex.H dated 14.4.2000 and so on, but there was no response. She was never intimated that the earlier interview has been cancelled in view of Government Resolution of 8.3.1999. If earlier advertisement was made in accordance with the provisions contained in Article 16(4) of the Constitution of India, reserving the post for ST/SEBC candidates the same could not be brushed aside by a subsequent advertisement converting the post into general category post vide Annexure : I. Annexure : I is, therefore, rendered invalid, illegal and contrary to Article 16(4) of the Constitution of India.

16. It further appears from the forgoing discussions

that though formal resolution was passed on the basis of letter dated 3.6.1999 of the Municipal Commissioner adopting the G.R. dated 8.3.1999, but in effect this resolution was not actually adopted inasmuch as till October 1999 the post was considered by the General Body of the Corporation and the Standing Committee to be post reserved for SC/SEBC candidates. Such action, on these facts and circumstances, appears to be illegal and contrary to the provisions of the Constitution. Since the G.R. dated 8.3.1999 is prospective the earlier advertisement with a view to clear backlog vacancy for ST/SEBC candidates could not be ignored on the strength of subsequent impugned advertisement Ex.I of July, 2000.

17. In view of the above discussions I am of the view that by virtue of G.R. dated 8.3.1999 the earlier vacancy reserved for ST/SEBC candidates which could easily be filled on 15.3.1999 cannot be converted into a general category post.

18. Shri B.P. Tanna has raised a dispute on the basis of counter Affidavit of Respondent No.3 that the petitioner belongs to Creamy Layer hence she is not entitled to be appointed on SEBC post. No finding is required to be given by this Court on this dispute in this petition because it is a disputed question of fact whether the petitioner belongs to Creamy Layer or not. The Certificate obtained from the Competent Authority shows that she is Hindu by caste belonging to Prajapati community of backwardclass vide Ex.A. The Corporation found her eligible to appear in the interview in response to advertisement dated 17.11.1998 and she was called for interview. Consequently if the interview is to be held in accordance with advertisement dated 17.11.1998 the question of petitioner belonging to Creamy Layer or not looses its significance. I, therefore, do not propose to answer this controversy in this writ petition.

19. In view of the above discussions the writ petition succeeds and is hereby allowed. The action of the respondent No.1 in de-reserving the post meant for ST/SEBC category in response to Special drive to clear the backlog vacancy for such post is held to be illegal and invalid and violative of Article 16(4) of the Constitution of India. Further issuing fresh advertisement dated 14.7.2000 (Annexure : I), inviting fresh applications for the same post from general category candidate is also held to be illegal and invalid. Subsequent advertisement Annexure : I is therefore quashed and set aside. The respondent No.1 is directed to proceed to hold interviews in response to

advertisement dated 17.11.1998 and select the candidate and fill up the post accordingly. No order as to costs.

sd/-

Date : April 19, 2001 (D. C. Srivastava, J.)

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